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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION – E-FILED

DAVID KAYNE, an individual citizen of Georgia, Plaintiff, vs. THE THOMAS KINKADE COMPANY, formerly known as MEDIA ARTS GROUP, INC., a Delaware Corporation, Defendant.) Case No. C 07-4721 JF (RS))) PLAINTIFF'S NOTICE OF MOTION) AND MOTION FOR AN ORDER) SHORTENING TIME FOR A) HEARING ON PLAINTIFF'S) MOTION FOR PRELIMINARY) INJUNCTION (Local Rule 6-3);) MEMORANDUM IN SUPPORT)) Hearing Date: October 5, 2007) Hearing Time: 9:00 a.m.) Courtroom: 3, 5th Floor
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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE

TAKE NOTICE that, pursuant to Local Rule 6-3, plaintiff DAVID KAYNE ("Mr. Kayne") will and hereby does move for an Order Shortening Time For Hearing on Plaintiff's Motion for a Preliminary Injunction. The hearing on this motion for order shortening time, to the extent one is deemed necessary by the Court, is requested to occur on October 5, 2007 at 9:00 a.m. at Courtroom 3 of this Court. By this motion, Mr. Kayne seeks the following alternative relief, depending upon whether this Court grants or denies Mr. Kayne's accompanying motion for a temporary restraining order to preserve the *status quo* pending the outcome of Mr. Kayne's concurrent motion for a preliminary injunction:

1 1. If Temporary Restraining Order precluding defendant from proceeding
2 with the subject arbitration until further order of this Court is granted by the
3 Court, then by this motion Mr. Kayne requests that the date(s) for further briefing
4 on and consideration of his motion for preliminary injunction shall be in time to
5 allow a hearing and decision of the matter by no later than October 15, 2007 (ten
6 days after issuance of the Temporary Restraining Order and one day before the
7 arbitration set for October 16). Counsel for David Kayne can be available at any
8 time between now and October 15 to argue this matter. Subject to the Court's
9 calendar, the following schedule is proposed and set out in the accompanying
10 [Proposed] Order:

11 a. Defendant's Opposition to Preliminary Injunction to be filed and
12 served by October 9, 2007 or such other expedited date as the Court may provide.

13 b. Plaintiff's Reply in Support of Preliminary Injunction to be filed
14 and served by **noon** on October 12, 2007 or such other expedited date as the Court
15 may provide.

16 c. Hearing on Plaintiff's Motion for Preliminary Injunction set for
17 October 15, 2007 at 9:00 a.m. or such other expedited date and time as the Court
18 may provide.

19 2. In the alternative, if a temporary restraining order is not granted by
20 the Court, then Mr. Kayne requests that the preliminary injunction hearing take
21 place on **October 5, 2007** at 9:00 a.m. In this circumstance, Mr. Kayne asks that
22 defendant's October 4 motion to be filed in response to the complaint be deemed to
23 be Defendant's opposition to Mr. Kayne's motion for preliminary injunction, and
24 that he be permitted to submit any reply to defendant's October 4 filing at the time
25 of the hearing on October 5, at which time the matter shall be deemed submitted.
26 Alternatively, Plaintiff requests that his motion for preliminary injunction be
27 considered on any other date between now and October 15, 2007.

1 This motion is and will be based on the following memorandum of points and
2 authorities, the accompanying Declaration of Charles L. Coleman, III in support of
3 this Motion and materials cited therein, the Complaint herein, the Declaration of
4 David Kayne in support of a temporary restraining order and preliminary
5 injunction (which verifies factual allegations in the Complaint), the accompanying
6 [Proposed] Order setting out the two alternative forms of relief sought, and such
7 other matters as may properly come before this Court.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 As is set out more fully in the accompanying Declaration of Charles L.
10 Coleman, III in Support of Plaintiff's Motion for an Order Shortening Time
11 ("Coleman Dec. re Rule 6-3"), this case revolves around an extraordinary
12 "expedited" arbitration procedure embedded in an "Application for Credit"
13 presented by defendant The Thomas Kinkade Company ("TKC") in 2001. *See*
14 *generally*, Coleman Dec. re Rule 6-3 at ¶¶ 2-6.

15 Under TKC's "expedited" procedures, the arbitration "hearing" is one in
16 which the right to require the production of witnesses is purportedly *waived*, so that
17 the proceedings are instead to be decided on the basis of "written documentary
18 evidence supplied by the parties." *Id.*, ¶ 3. *See* complaint, Exhibit "A". TKC seeks
19 to use this truncated "procedure" specified in its agreements to pursue Mr. Kayne
20 for over \$1.15 million while at the same time seeking to deprive Mr. Kayne of the
21 most fundamental rights to conduct discovery and call, confront and cross-examine
22 witnesses in a hotly-contested matter. *Id.*, ¶ 5.

23 A hearing on shortened time is requested because TKC is preparing to
24 proceed with an arbitration "hearing" on October 16, 2007 to get a ruling on the
25 "merits" of its claim against Mr. Kayne using the objectionable arbitration
26 provisions that are the subject of Mr. Kayne's complaint herein. *Id.*, ¶ 7. At the
27


1 same time, TKC will be responding to Mr. Kayne's complaint with a motion to be
 2 filed by October 4, 2007. *Id.*, ¶¶ 8, 17.

3 The issues raised by Mr. Kayne's request for injunctive relief and by TKC's
 4 anticipated motion to dismiss to be filed October 4 are substantially overlapping,
 5 such that it makes sense to have the briefing on these two motions coordinated in
 6 such a way as to obtain a ruling from this Court before the summary arbitration
 7 (presently scheduled for October 16) proceeds. *Id.*, ¶¶ 15-17. With this in mind,
 8 counsel for Mr. Kayne contacted counsel for TKC to propose a mutually-agreeable
 9 briefing schedule to allow for this matter to be briefed and decided before the
 10 objected-to arbitration is conducted. TKC's counsel declined to agree to any
 11 reduction in, or modification of, the briefing schedule to accommodate plaintiff's
 12 need to obtain a ruling before October 16. *Id.*, ¶¶ 11-12.

13 Mr. Kayne will be prejudiced if TKC is allowed to proceed with its
 14 unconscionable "expedited" arbitration procedure in pursuit of an award against
 15 Mr. Kayne for over \$1.15 million, the validity of which Mr. Kayne hotly disputes.
 16 *Id.* at ¶ 13. *See also*, the Declaration of David Kayne accompanying his motion for
 17 temporary restraining order and preliminary injunction. By contrast, there will be
 18 no apparent prejudice to TKC if it is required to postpone briefly its arbitration
 19 proceeding in order to address the issues presented in Mr. Kayne's complaint for
 20 injunctive relief. *See* the accompanying Declaration of Charles L. Coleman, III in
 21 support of this motion to shorten time at ¶¶ 14-17.

22 Dated: October 1, 2007

HOLLAND & KNIGHT LLP

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 25 CHARLES L. COLEMAN, III
 26 ANDREW T. CAULFIELD

27 Attorneys for Plaintiff
 28 DAVID KAYNE